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17 Attorneys for Defendants
18 Herbalife Ltd., Michael O. Johnson,
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

IN RE HERBALIFE, LTD.
SECURITIES LITIGATION

Case No. 2:14-CV-02850-DSF (JCGx)

**REQUEST FOR JUDICIAL NOTICE
IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS
PLAINTIFFS' AMENDED
COMPLAINT**

1 In accordance with Federal Rule of Evidence 201, Defendants Herbalife Ltd.
 2 (“Herbalife”), and Michael O. Johnson, Desmond Walsh, and John DeSimone
 3 (collectively, the “Individual Defendants”) respectfully request that the Court take
 4 judicial notice of, or consider under the doctrine of incorporation by reference, the
 5 following documents in the concurrently filed Declaration of Daniel S. Floyd
 6 submitted in connection with Defendants’ Motion to Dismiss Plaintiffs’ Amended
 7 Complaint (“Complaint”):

8	Exhibit 1	Herbalife’s Form 10-K for the period ending December 31, 2009, 9 filed with the U.S. Securities and Exchange Commission (“SEC”) 10 on February 23, 2010
11	Exhibit 2	Herbalife’s Form 10-K for the period ending December 31, 2010, 12 filed with the SEC on February 22, 2011
13	Exhibit 3	Herbalife’s Form 10-K for the period ending December 31, 2011, 14 filed with the SEC on February 21, 2012
15	Exhibit 4	Herbalife’s Form 10-K for the period ending December 31, 2012, 16 filed with the SEC on February 19, 2013
17	Exhibit 5	Herbalife’s Form 10-K for the period ending December 31, 2013, 18 filed with the SEC on February 18, 2014
19	Exhibit 6	Herbalife’s Form 10-Q for the period ending March 31, 2011, filed 20 with the SEC on May 2, 2011
21	Exhibit 7	Herbalife’s Form 10-Q for the period ending June 30, 2011, filed 22 with the SEC on August 1, 2011
23	Exhibit 8	Herbalife’s Form 10-Q for the period ending September 30, 2011, 24 filed with the SEC on October 31, 2011
25	Exhibit 9	Herbalife’s Form 10-Q for the period ending March 31, 2012, filed 26 with the SEC on April 30, 2012
27	Exhibit 10	Herbalife’s Form 10-Q for the period ending June 30, 2012, filed 28 with the SEC on July 30, 2012

1	Exhibit 11	Herbalife's Form 10-Q for the period ending September 30, 2012, filed with the SEC on October 29, 2012
2	Exhibit 12	Herbalife's Form 10-Q for the period ending March 31, 2013, filed with the SEC on April 29, 2013
3	Exhibit 13	Herbalife's Form 10-Q/A for the period ending March 31, 2013, filed with the SEC on December 16, 2013
4	Exhibit 14	Herbalife's Form 10-Q for the period ending June 30, 2013, filed with the SEC on July 29, 2013
5	Exhibit 15	Herbalife's Form 10-Q for the period ending September 30, 2013, filed with the SEC on October 28, 2013
6	Exhibit 16	Herbalife's Form 10-Q for the period ending March 31, 2014, filed with the SEC on April 28, 2014
7	Exhibit 17	Herbalife's Form 10-Q for the period ending June 30, 2014, filed with the SEC on July 28, 2014
8	Exhibit 18	Herbalife's Form 8-K for the period ending May 1, 2012, filed with the SEC on May 2, 2012
9	Exhibit 19	Forms 4 concerning Michael Johnson's stock sales during Plaintiffs' proposed class period and for the six months preceding it
10	Exhibit 20	Forms 4 concerning Desmond Walsh's stock sales during Plaintiffs' proposed class period and for the six months preceding it, as well as Walsh's purchases of Herbalife stock after July 28, 2014
11	Exhibit 21	Forms 4 concerning John DeSimone's stock sales during Plaintiffs' proposed class period and for the six months preceding it, as well as DeSimone's purchases of Herbalife stock after July 28, 2014
12	Exhibit 22	Herbalife's Press Release, entitled "Herbalife Announces Results of Study on Distributors and End Users in the U.S.," dated June 11, 2013

1	Exhibit 23	Herbalife's Press Release, entitled "Herbalife Ltd. Announces 2 Second Quarter 2014 Results and Raises 2014 Earnings Guidance," 3 dated July 28, 2014
4	Exhibit 24	Excerpts of a PowerPoint presentation, entitled "Herbalife Investor 5 Day Presentation," dated January 10, 2013
6	Exhibit 25	Excerpts of a transcript of Herbalife's May 1, 2012 earnings 7 conference call
8	Exhibit 26	An article published by <i>The New York Times</i> on October 25, 2014, 9 entitled "Bill Ackman and His Hedge Fund, Betting Big"
10	Exhibit 27	An article published by <i>The New York Times</i> on December 20, 11 2012, entitled "Ackman Outlines Bet Against Herbalife"
12	Exhibit 28	An article published by <i>The New York Times</i> on January 10, 2013, 13 entitled "What's at the Center of the Debate Over Herbalife"
14	Exhibit 29	An article published by <i>The New York Times</i> on January 9, 2013, 15 entitled "S.E.C. Opens Investigation Into Herbalife"
16	Exhibit 30	An article published by the <i>New York Post</i> on July 17, 2013, entitled 17 "FTC Herbalife meeting spicy"
18	Exhibit 31	An article published by <i>The New York Times</i> on March 5, 2013, 19 entitled "In Herbalife 'Short War,' Hedge Funds Miss the Target"
20	Exhibit 32	An article published by <i>The New York Times</i> on May 1, 2012, 21 entitled "Einhorn Questions Prompt Selloff at Herbalife"
22	Exhibit 33	An article published by <i>Reuters</i> on May 1, 2012, entitled "Herbalife 23 shares swoon on Einhorn queries"
24	Exhibit 34	An article published by <i>Business Insider</i> on December 19, 2012, 25 entitled "Bill Ackman Is Short Herbalife And The Stock Is Diving"
26	Exhibit 35	An article published by <i>Reuters</i> on December 20, 2012, entitled 27 "Pershing Square's Ackman shorts Herbalife; stock skids"

1	Exhibit 36	An article published by <i>TheStreet</i> on December 21, 2012, entitled “Herbalife Defenders Get Personal With Ackman, Shorts”
2	Exhibit 37	An article published by <i>The New York Times</i> on January 23, 2014, entitled “Senator Is Lobbying for Inquiry on Herbalife”
3	Exhibit 38	An article published by <i>Bloomberg</i> on January 23, 2014, entitled “Herbalife Falls as Senator Calls for Probe of Business Practices”
4	Exhibit 39	An article published by <i>Fox Business</i> on January 23, 2014, entitled “Herbalife Sells Off as U.S. Senator Calls for Pyramid Scheme Probe”
5	Exhibit 40	An article published by <i>Business Insider</i> on January 23, 2014, entitled “Herbalife is Tanking”
6	Exhibit 41	An article published by <i>The Boston Globe</i> on March 15, 2014, entitled “Markey may have exaggerated claims about Herbalife”
7	Exhibit 42	An article published by <i>The New York Times</i> on March 12, 2014, entitled “F.T.C. Inquiry Into Herbalife Prompts Big Share Selloff”
8	Exhibit 43	An article published by <i>The Wall Street Journal</i> on March 12, 2014, entitled “Federal Trade Commission Starts Herbalife Probe”
9	Exhibit 44	An article published by <i>MarketWatch</i> on July 28, 2014, entitled “Herbalife slumps in after hours as earnings fall short”
10	Exhibit 45	An article published by the <i>Los Angeles Times</i> on July 28, 2014, entitled “Herbalife profits are below expectations; shares fall after- hours”
11	Exhibit 46	An article published by the <i>Los Angeles Business Journal</i> on July 19, 2010, entitled “Herbalife leads lean, mean pack of profitability”
12	Exhibit 47	An article published by the <i>Miami Herald</i> on October 19, 2009, entitled “Do homework before starting home business”

1	Exhibit 48	The Final Judgment stipulated and consented to by the State of
2		California and Herbalife, filed on October 15, 1986

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4 Consideration of these documents is appropriate for the reasons set forth below.

5 **I. THE LEGAL STANDARD**

6 Pursuant to Federal Rule of Evidence 201, a court may take judicial notice of
7 relevant facts that are “not subject to reasonable dispute.” Fed. R. Evid. 201(b). This
8 includes facts that are “generally known within the trial court’s territorial jurisdiction,”
9 and facts that “can be accurately and readily determined from sources whose accuracy
10 cannot reasonably be questioned.” *Id.* A court “must take judicial notice if a party
11 requests it and the court is supplied with the necessary information.” Fed. R. Evid.
12 201(c). Facts subject to judicial notice may be considered on a motion to dismiss.
13 *E.g., In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1051 (9th Cir. 2014); *City of*
14 *Royal Oak Ret. Sys. v. Juniper Networks, Inc.*, 880 F. Supp. 2d 1045, 1059 (N.D. Cal.
15 2012) (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 689–90 (9th Cir. 2001)); *In re*
16 *Am. Apparel, Inc. S’holder Litig.*, 855 F. Supp. 2d 1043, 1060 (C.D. Cal. 2012).

17 The separate doctrine of “incorporation by reference” also permits consideration
18 of “a document when a ‘plaintiff’s claim depends on the contents of a document’ and
19 ‘the parties do not dispute the authenticity of the document, even though the plaintiff
20 does not explicitly allege the contents of that document in the complaint.’” *E.g.,*
21 *Falkenberg v. Alere Home Monitoring, Inc.*, 2014 WL 5020431, at *1 n.1 (N.D. Cal.
22 Oct. 7, 2014) (quoting *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005)). Under
23 such circumstances, the document “becomes part of the complaint and the court
24 accordingly assumes the truth of its contents for the purposes of ruling on motion to
25 dismiss pursuant to Rule 12(b)(6).” *E.g., In re Ubiquiti Networks, Inc. Sec. Litig.*, ---
26 F. Supp. 2d ----, 2014 WL 1254149, at *4 n.2 (N.D. Cal. Mar. 26, 2014) (citing *United*
27 *States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003)).

1 The Exhibits to the Declaration of Daniel S. Floyd referenced above may be
 2 considered for one or both of these reasons.

3 **II. THE DOCUMENTS MAY BE CONSIDERED**

4 **A. Documents Filed with the United States Securities and Exchange
 5 Commission.**

6 **1. Herbalife's Forms 10-K, 10-Q, and 8-K.**

7 The Court may take judicial notice of Herbalife's SEC filings attached as
 8 Exhibits 1–18. It is well established that a court may take judicial notice of documents
 9 that are required to be filed with the SEC. *See, e.g., Dreiling v. Am. Express Co.*, 458
 10 F.3d 942, 946 n.2 (9th Cir. 2006) (“We . . . may consider documents referred to in the
 11 complaint or any matter subject to judicial notice, such as SEC filings.”); *In re Wet
 12 Seal, Inc. Sec. Litig.*, 518 F. Supp. 2d 1148, 1158 (C.D. Cal. 2007) (in ruling on a
 13 motion to dismiss, “the court may consider public filings, including SEC filings”
 14 (internal citations and emphases omitted)). This includes Forms 10-K, 10-Q, and 8-K.
 15 *See, e.g., In re Am. Apparel, Inc. S'holder Litig.*, 855 F. Supp. 2d at 1062 (taking
 16 judicial notice of defendant's Forms 10-K, 10-Q, and 8-K); *In re Int'l Rectifier Corp.
 17 Sec. Litig.*, 2008 WL 4555794, at *1 (C.D. Cal. May 23, 2008) (granting defendants'
 18 request for judicial notice of certain documents that defendants filed with the SEC
 19 including Forms 10-K and 10-Q). Accordingly, the Court may take judicial notice of
 20 the SEC filings attached as Exhibits 1–18.

21 **2. The Individual Defendants' Forms 4.**

22 The Court also may take judicial notice of the Individual Defendants' Forms 4
 23 attached as Exhibits 19–21. A court may take judicial notice of Forms 4 even if they
 24 are not expressly referenced in the complaint. *See, e.g., City of Royal Oak Ret. Sys.*,
 25 880 F. Supp. 2d at 1059 (“[C]ourts may take judicial notice of SEC Forms 4, even
 26 when not referenced in the pleading, to prove that stock sales were made pursuant to a
 27 Rule 10b5–1 trading plan.”); *Cement Masons & Plasterers Joint Pension Trust v.
 28 Equinix, Inc.*, 2012 WL 685344, at *8 n.5 (N.D. Cal. Mar. 2, 2012) (taking judicial

1 notice of SEC Forms 4 describing individual defendants' stock sales although they
 2 were not referenced in the complaint); *see also Wozniak v. Align Tech., Inc.*, 2011 WL
 3 2269418, at *7 n.5 (N.D. Cal. June 8, 2011) (taking judicial notice of SEC filing not
 4 referenced in the complaint). The Forms 4 are "not subject to reasonable dispute" and
 5 "capable of accurate and ready determination by resort to sources whose accuracy
 6 cannot reasonably be questioned." *Cement Masons & Plasterers Joint Pension Trust*,
 7 2012 WL 685344, at *8 n.5 (quoting Fed. R. Evid. 201). Moreover, the Court may
 8 consider the contents of the Forms 4 in determining whether Plaintiffs have
 9 sufficiently pled scienter. *Id.* at *8 (observing, based on stock sales described in
 10 individual defendants' Forms 4, that plaintiffs failed to allege a motive); *City of Royal*
 11 *Oak Ret. Sys.*, 880 F. Supp. 2d at 1069 (taking judicial notice of defendants' Forms 4
 12 and holding that stock sales described therein did not support a strong inference of
 13 scienter); *Allison v. Brooktree Corp.*, 999 F. Supp. 1342, 1352 n.3 (S.D. Cal. 1998)
 14 (taking judicial notice of individual defendant's Form 4, although plaintiffs did not
 15 allege any stock sales by defendant, and observing that the purchase of stock and lack
 16 of sales during the class period negated an inference of motive).

17 **B. Press Releases, Investor Presentation, Conference Call Transcript, and**
 18 **News Reports.**

19 The Court also may take judicial notice of the press releases, investor
 20 PowerPoint presentation, conference call transcript, and news articles that are attached
 21 as Exhibits 22–47. Taking judicial notice of these documents "is appropriate for
 22 show[ing] 'that the market was aware of the information'" in those documents. *In re*
 23 *Am. Apparel*, 855 F. Supp. 2d at 1062 (quoting *Heliotrope Gen., Inc. v. Ford Motor*
 24 *Co.*, 189 F.3d 971, 981 n.18 (9th Cir. 1999)); *see also In re Century Aluminum Co.*
 25 *Sec. Litig.*, 749 F. Supp. 2d 964, 979–80 (N.D. Cal. 2010) (granting defendants'
 26 request for judicial notice of conference call transcripts, PowerPoint presentations, and
 27 news articles); *In re Copper Mountain Sec. Litig.*, 311 F. Supp. 2d 857, 864 (N.D. Cal.
 28 2004) (taking judicial notice of press releases, conference call transcripts, and news

1 reports and observing that “the court may take judicial notice of information that was
 2 publicly available to reasonable investors at the time the defendant made the allegedly
 3 false statements”). Indeed, “[c]ourts in the Ninth Circuit routinely take judicial notice
 4 of press releases.” *In re Am. Apparel*, 855 F. Supp. 2d at 1062 (listing examples).

5 **C. The 1986 Consent Order.**

6 The Court may take judicial notice of the 1986 Consent Order with the
 7 California Attorney General attached as Exhibit 48 because it is a matter of public
 8 record. *Intri-Plex Techs., Inc. v. Crest Grp.*, 499 F.3d 1048, 1052 (9th Cir. 2007)
 9 (courts may take judicial notice of “matters of public record” that are not “subject to
 10 reasonable dispute”); *Doe v. Mann*, 415 F.3d 1038, 1040 n.3 (9th Cir. 2005) (taking
 11 judicial notice of records related to proceedings in state court). Consideration of this
 12 document is also appropriate under the doctrine of incorporation by reference as it is
 13 explicitly referenced in the Complaint. *See infra* at II.D.

14 **D. Documents Referenced in the Complaint.**

15 Herbalife and the Individual Defendants also request that the Court consider
 16 certain documents that are referenced and/or quoted in the Complaint. It is well
 17 established that “documents whose contents are alleged in a complaint and whose
 18 authenticity no party questions, but which are not physically attached to the pleading,
 19 may be considered in ruling on a Rule 12(b)(6) motion to dismiss.” *Branch v. Tunnell*,
 20 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith v. Cnty. of*
 21 *Santa Clara*, 307 F.3d 1119 (9th Cir. 2002); *see also Ritchie*, 342 F.3d at 908
 22 (explaining that a document not attached to the complaint but referenced therein may
 23 be considered on defendant’s motion to dismiss); *In re Wet Seal*, 518 F. Supp. 2d at
 24 1157–58 (noting that the court may consider “other matters of public record such as
 25 press releases, analyst reports, news articles, and conference call transcripts in cases
 26 such as this, where they are relied upon by the complaint”); *In re Am. Apparel*, 855 F.
 27 Supp. 2d at 1062 (noting that certain news articles were “explicitly referenced in the
 28

1 complaint, making consideration of them proper under the incorporation by reference
2 rule.”).

3 Furthermore, the *full text* of documents referenced or cited in a complaint may
4 be considered even though the complaint quotes only portions of those documents.
5 *See, e.g., In re Wet Seal*, 518 F. Supp. 2d at 1158 (“[O]n a motion to dismiss securities
6 fraud claims, ‘the court may consider the full text of the relevant documents to
7 determine whether the plaintiffs have alleged material misrepresentations or
8 omissions,’ without converting the motion to a motion for summary judgment.”
9 (quoting *In re Infonet Servs. Corp. Sec. Litig.*, 310 F. Supp. 2d 1106, 1113 (C.D. Cal.
10 2004))); *In re Autodesk, Inc., Sec. Litig.*, 132 F. Supp. 2d 833, 837–38 (N.D. Cal.
11 2000) (A “defendant may attach to a 12(b)(6) motion the documents referred to in the
12 complaint to show that they do not support plaintiff’s claim. Thus, the court may
13 consider the full text of a document the complaint quotes only in part.” (citation
14 omitted)).

15 Accordingly, because they are referenced and/or quoted in the Amended
16 Complaint, the doctrine of incorporation by reference provides an alternate basis for
17 the Court to consider Exhibits 2–18, 23–25, 29, and 48.

18 III. CONCLUSION

19 For the foregoing reasons, Defendants’ respectfully request that the Court take
20 judicial notice of, or consider under the doctrine of incorporation by reference, the
21 exhibits to the Declaration of Daniel S. Floyd submitted in connection with
22 Defendants’ Motion to Dismiss the Complaint.

24 DATED: November 3, 2014

GIBSON, DUNN & CRUTCHER LLP

25 By: /s/ JONATHAN C. DICKEY
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27 Attorneys for Defendants